U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 July 2005

BALCA Case No.: 2004-INA-0341
ETA Case No.: P2003-NY-02498466

In the Matter of:

CADMAN PRINTING CORPORATION,
Employer,

on behalf of

MARIUS SHTRAVZNT,
Alien.

Appearance: Earl S. David, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

John M. Vittone
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.[1] We base our decision on the record upon which the CO denied

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 27, 2001, the Employer filed an application for alien employment certification on behalf of the alien, Marius Shtravznt, to fill the position of "Printer." (AF 121-24). The Employer described the job to be performed on the application as follows: "Printer for flexo, specializing in webtron 650, with capabilities of process job." (AF 121).

On April 26, 2001, the Employer requested Reduction in Recruitment ("RIR") processing in a letter addressed to the New York Department of Labor ("NYDOL"). (AF 129). The Employer also advertised the position in the *Daily News* newspaper of New York, on March 29, 30, and 31, 2001. In its advertisement, the Employer listed an experience requirement of two years. (AF 125-28).

The NYDOL received the Employer's application for alien employment certification and thereafter advised the Employer of defects in the application. It advised the Employer that it must give notice of the application for alien employment certification to its employees and it listed the specific content to be included in the notice. The NYDOL also instructed the Employer to document that its position was full-time, and requested that the Employer clarify whether the employee would solely operate the printing press or also perform additional duties. Lastly, the NYDOL advised the Employer to complete section "B15" of its application. (AF 119-20).

In response to this correspondence from the New York Department of Labor, the Employer amended its application, (AF 114-17), and also posted a notice to its employees regarding its job opening and application for alien employment certification. (AF 113). The Employer posted the notice on a company bulletin board for 10 business days and reportedly received no responses to the notice. (AF 112).

Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

On March 9, 2004, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 104-07). In the NOF, the CO denied the Employer's request for RIR, explaining that no listing of the Employer could be found to verify the Employer's identity. The CO explained that there was a question as to whether the Employer was offering a *bona fide* job opportunity. (AF 104-07). The CO advised the Employer that in order to rebut its findings with respect to the existence of a *bona fide* job opportunity, it had to submit the following documentation: a current lease or rental agreement for business premises; a copy of its business telephone bills for the last six months; a copy of its Federal Income Tax Returns for 2000, 2001, and 2002; a list of its employees with their job titles and work schedules; copies of W-2s for all employees employed during the years 2002 and 2003; and evidence of printing jobs such as contracts, invoices, and work orders. (AF 105).

Next, the CO advised the Employer in the NOF that it had listed an unduly restrictive experience requirement for its printer position. The Employer's posting required that applicants have two years of experience. However, the CO explained that the *Supplement to the Dictionary of Occupational Title* provides that the position should only require three to six months of combined education, training and/or experience. Thus, the CO advised the Employer that its two-year experience requirement exceeded the Specific Vocational Preparation ("SVP") for its printer position. The CO explained that the Employer could rebut the finding of the unduly restrictive experience requirement by showing that the requirement arose from a business necessity. (AF 105-06).

The CO explained that to prove business necessity, the Employer must submit evidence showing that the job requirement bears a reasonable relationship to the occupation and that it is essential to performing, in a reasonable manner, the job duties of the position. The CO also instructed the Employer to prove that the job, as currently described, existed before the Employer filed its application for alien employment certification. As an alternative to proving business necessity, the CO advised the Employer that it could amend its application with respect to the two-year experience requirement. (AF 105-06).

The CO additionally advised the Employer that it had failed to document the results of its March 29, 30, and 31, 2001, advertisement in the Daily News. The CO explained to the Employer that it could rebut this finding by documenting whether there were any responses to its advertisement. In the NOF, the CO further notified the Employer that "Item 15b" of its application for alien employment certification needed to be completed so that the application included the alien's dates of employment and duties with the Employer. Lastly, the CO instructed the Employer to indicate its willingness to advertise its position. (AF 106-07).

On April 13, 2004, the Employer filed its rebuttal. (AF 14-102). The rebuttal included the Employer's Federal Income Tax returns for 2001, 2002 and 2003, (AF 15-38), company telephone bills, (AF 61-102), printing contracts and invoices, (AF 39-60), a statement by the Employer that there were no responses to its *Daily Journal* advertisement, and another statement that it was willing to re-advertise its printer position, (AF 14).

The CO issued a Final Determination on April 20, 2004, again denying the Employer's application. The CO explained that the basis of the denial was the Employer's failure to rebut the CO's finding that its experience requirement was unduly restrictive. (AF 12-13). On May 12, 2004, the Employer filed a request for review of the CO's decision, stating that it had located job postings for other printer positions, which listed experience requirements of one to two years. The Employer attached the job advertisements to its request for review and asserted that the three to six-month experience requirement listed in the Supplement to the *Dictionary of Occupational Titles* was outdated. (AF 1-3).

DISCUSSION

Federal regulations at 20 C.F.R. § 656.21(b)(2) proscribe the use of unduly restrictive job requirements in the recruitment process. An employer cannot impose a requirement that is abnormal for the occupation or not included in the *Dictionary of Occupational Titles* unless it establishes a business necessity for the requirement. *Id.; see Lucky Horse Fashion, Inc.,* 1997-INA-182 (Aug. 22, 2000) (*en banc*). Requirements are considered unduly restrictive when they

are not normally required for the successful performance of a job. 20 C.F.R. § 656.21(b)(2)(i)(A).

In order to show business necessity, an employer must show that the requirement it imposes bears a reasonable relationship to the occupation in the context of the Employer's business. It also must show that the requirement is essential to performing, in a reasonable manner, the job duties of the position as described by the Employer. *Information Industries, Inc.* 1988-INA-82 (Feb. 9, 1989) (*en banc*). Vague and incomplete rebuttal documentation, however, will not meet an employer's burden of establishing business necessity. *Analysts International Corp.,* 1990-INA-387 (July 30, 1991).

In this case, the CO identified as unduly restrictive the Employer's two-year experience requirement for its printer position. (AF 105-06). Although the Employer successfully rebutted the other findings in the NOF, its rebuttal failed to address the CO's finding that the Employer's two-year experience requirement constituted an unduly restrictive requirement. In the NOF, the CO had advised the Employer that in order to rebut the unduly restrictive finding, it could either show that its requirement arose from a business necessity or it could amend the experience requirement in its application. (AF 105-06).

Instead of rebutting the CO's finding with proof of business necessity or amending the experience requirement, the Employer, in its rebuttal, did not address the CO's finding of the unduly restrictive experience requirement. If it had amended or reduced the two-year experience requirement to the three to six months of combined education, training and/or experience required under the *Supplement to the Dictionary of Occupational Titles,* the Employer would have rebutted the CO's finding. However, it failed to make any attempt at rebutting the CO's finding, instead leaving its two-year experience requirement in place. Because all findings in the Notice of Findings not rebutted are deemed admitted, 20 C.F.R. § 656.25(e)(3), the Employer is deemed to have admitted that its two-year experience requirement is unduly restrictive. Accordingly, the CO properly denied RIR and labor certification.

Although the Employer submitted, with its request for review, evidence of other printer positions with experience requirements of one to two years, (AF 1-3), this evidence will not be considered as this Board is not authorized to consider evidence first submitted with the request for review. 20 C.F.R. §§ 656.26(b)(4), 656.27(c); *Cathay Carpet Mills, Inc.,* 1987-INA-161 (Dec 7, 1988) (*en banc*); *Fried Rice King Chinese Restaurant,* 1987-INA-518 (Feb. 7, 1989) (*en banc*); *Kelper Int'l Corp.,* 1990-INA-191 (May 20, 1991); *Capriccio's Restaurant,* 1990-INA-480 (Jan. 7, 1992). Even if the postings had been part of the record, however, they would not have proven the Employer's two-year experience requirement acceptable. The postings indicated that other employers were accepting applicants for a printer position with one year of experience whereas the Employer in this case required applicants to have two years of experience.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Accordingly, the CO's denial of RIR in this case shall result in the remand of the Employer's application for alien employment certification to the local job service for regular processing without the unduly restrictive experience requirement.

ORDER

The CO's denial of RIR in this case is hereby **AFFIRMED**. Accordingly, the Employer's application for alien employment certification shall be **REMANDED** to the local job service for regular processing without the unduly restrictive experience requirement.

SO ORDERED.

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John M. Vittone
Chief Administrative Law Judge